

# Legal News

## Competition Commission sanctions obstruction of parallel imports; The Elmex case

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Dear clients and business friends

One has almost become accustomed in the meantime to news about the imposition of high competition fines by the European Commission. But when heavy competition fines are imposed by the Swiss Federal Competition Commission ("WEKO"), they grab attention. Particularly memorable were the two sanctions against Swisscom amounting to CHF 333 million (decision of February 2007 regarding termination charges which has in the meantime been overruled by the Federal Administrative Court) and CHF 220 million (decision of November 2009 regarding pricing policy for ADSL services). Both of these decisions (which are not in legal force yet) relate to the abuse of a dominant position in the sense of article 7 of the Cartel Act ("KG"). At the beginning of December 2009, the producer of Elmex toothpaste, Gaba International AG, was fined CHF 4.8 million because of an export ban which it had imposed on its licensee in Austria. This is only the second case in Switzerland of a sanction imposed because of a so-called "vertical restraints of competition".

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### 1. Circumstances

The fine against Gaba International AG ("Gaba") was triggered by an agreement from 1982 in which Gaba imposed an export ban on its Austrian licensee and distributor, Gebro Pharma GmbH ("Gebro") for Elmex toothpaste which was being produced under licence. The relevant clause was worded as follows: "*Gebro undertakes (...) to produce and distribute the contractual products exclusively in its contractual territory (Austria) and not to export them, directly or indirectly, to other countries.*" The retail chain Denner AG ("Denner"), which had removed Elmex from its range of products in 1994, made several attempts from 2003 onwards to obtain supplies of Elmex from Gaba. As Gaba refused to supply Denner, the latter tried to import Elmex parallel from Austria, not least of all with the aim of being able to offer Elmex on the Swiss market at a price lower than those of competitors. The Austrian trading intermediary approached for this purpose told Denner that Gebro would not supply it with Elmex for export purposes. In autumn 2005, Denner submitted a complaint to the WEKO against Elmex. After a preliminary investigation, the WEKO finally opened a formal investigation in the spring of 2007, culminating in December 2009 in the sanction verdict under discussion here. The verdict is not yet in legal force. One must assume that it will be referred on to the Federal Administrative Court.

Although Denner dissociated itself from the process in the spring of 2009 because in the meantime it was being supplied with Elmex from Switzerland, and even though Gaba and Gebro amended their agreement in 2006 and abolished the absolute ban on exports, the WEKO pushed on with the process on the basis of fundamental considerations. According to its own statement, the WEKO wants to "*continue to pursue with high priority contractual obstructions to parallel imports*". In particular, it wants to prevent any undermining of the revision of the patent law, which entered into legal effect as at 1<sup>st</sup> July 2009 and with which parallel imports are facilitated for products which are patent-protected and not subject to state price control, as well as the imminent introduction of the Cassis-de-Dijon principle.

### 2. Considerations

The WEKO qualified the export ban clause cited in the description of circumstances as a *vertical competition agreement* regarding the exclusive allocation of territories. The agreement was classified as "vertical" because it was concluded between companies at different market levels, i.e. between Gaba as the primary producer and licensor and Gebro as the licensee and distributor. Decisive was that Gebro was not only forbidden from *actively* selling the toothpaste abroad (and therefore also in Switzerland) that it was producing under licence but that, in addition, the so-called *passive* sales,

i.e. sales neither promoted nor initiated by Gebro, to foreign customers (like Denner) was also banned. Together with the fact that Gaba also controlled the distribution of Elmex in other European markets, the result, according to the findings of the WEKO, was that there was *absolute territorial protection* with implications in Switzerland.

According to article 5, para. 4 KG, if agreements of that kind exist, an *elimination* of effective competition is *suspected*. The suspicion of elimination of competition could not be subsequently corroborated. The WEKO in fact came to the conclusion that on the Swiss market - despite the foreclosure caused by the agreement between Gaba and Gebro - the competition between different providers of Elmex (so-called "Intrabrand competition") was not entirely prevented and there was also competition with providers of other toothpastes than Elmex (so-called "Interbrand competition"). It was therefore necessary to examine whether at least there was a *significant restraint* of competition in the sense of article 5, para. 1 KG. The WEKO said that that was the case. On the one hand, there was a documented territorial agreement (qualitative criterion). On the other hand, the WEKO concluded that the parallel imports targeted by Denner due to the price difference between Austria and Switzerland would have had a price-reducing effect for Elmex toothpaste in Switzerland (quantitative criterion). That effect, said the WEKO, had been prevented by the agreement.

Although - as determined - a complete elimination of effective competition could not be assumed, the WEKO nevertheless penalised Gaba as well as Gebro with an *administrative sanction*. As per article

49a, para. 1 KG, this amounts to a maximum of 10% of the (total) Swiss sales achieved by the companies involved in the last three years. The result was that Gaba and Gebro were sanctioned with amounts of about CHF 4.8 million and CHF 10,000 respectively.

### 3. Conclusions

Whether the WEKO decision will stand up in the Federal Administrative Court and perhaps later at Federal Supreme Court level remains to be seen. As in the course of the WEKO procedures, Gaba will certainly not fail to point out, among other things, that Denner never tried to order directly from Gebro (rather than from the intermediate trader). Furthermore, the courts will probably have to deal with further matters that have been disputed in theory and practice until now, namely whether (1) if Interbrand competition exists, one can really assume existence of a significant restraint of competition and whether (2) if there really is a significant restraint (and not only in the case of entire elimination) of effective competition, a sanction can be imposed.

Regardless of the outcome of the Elmex case, it is highly advisable to avoid, in any existing or new distribution and sales agreements with exclusive territorial allocations, clauses which forbid so-called passive sales (on the basis of spontaneous, not actively procured orders) and therefore give rise to complete territorial foreclosure. On the basis of article 5 KG and the announcement of how vertical agreements are to be handled from the point of view of anti-competition legislation, the WEKO apparently wants to combat agreements of that kind with all severity.

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